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No. 05-18

IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

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BRIEF IN REPLY

I. The Second Circuit erred in holding that the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B), authorizes a court to award expert fees to the parents of a child with a disability who is a prevailing party under the IDEA.

Expert witness fees are not recoverable under the Individuals's with Disabilities Education Act ("IDEA"), which provides only for shifting of "reasonable attorneys' fees as part of the costs" associated with a proceeding under the Act. *See West Vir. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991) (interpreting nearly identical language in the former version of 42 U.S.C. § 1988 not to include expert fees), *superseded by statute*, 42 U.S.C. § 1988(c) (2003); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003) (finding no authorization in IDEA for expert witness fees); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1032 (8th Cir. 2003) (finding nothing in the plain language of IDEA authorizes recovery of expert witness fees). "The correct decision," on whether or not the IDEA provides for recovery of expert fees, "does not seem difficult to reach, for the Supreme Court has stated in fairly unequivocal terms that language nearly identical to that used in Section 1415 is unambiguous and, more to the point, does not allow a prevailing party to shift his expert fees." *Goldring v. District of Columbia*, 416 F.3d 70, 73 (D.C. Cir. 2005).

Contrary to the parents' claim, there is an equal amount of district court precedent denying recovery of expert fees under the IDEA, *see Mayo v. Booker*, 56 F. Supp. 2d 597, 599 (D. Md. 1999) (holding that expert witness fees not available under IDEA); *Eirschele v. Craven County Bd. of Educ.*, 7 F. Supp. 2d 655, 659 (D.N.C. 1998) (determining that Section 1415 "does not provide for an award of expert

witness fees"); *Shanahan v. Board of Educ. of the Jamesville - DeWitt Sch. Dist.*, 953 F. Supp. 440, 446 n.9 (N.D.N.Y. 1997) (holding that the IDEA provided no authority to courts to award expert fees as part of attorneys' fees and costs); *Cynthia K. v. Board of Educ. of Lincoln-Way High Sch. Dist.*, No. 95 Civ. 7172, 1996 WL 164381 at *2 (N.D. Ill. Apr. 1, 1996) (finding that expert fees "are simply not recoverable" under the IDEA), as there is allowing for such recovery, *see Board of Educ. of Frederick County v. I.S.*, 358 F. Supp. 2d 462, 473 (D. Md. 2005); *Gross v. Perrysburg Exempted Village Sch. Dist.*, 306 F. Supp. 2d 726, 738-739 (N.D. Ohio 2004); *B.D. v. DeBuono*, 177 F. Supp. 2d 201, 207-208 (S.D.N.Y. 2001); *Pazik v. Gateway Reg'l Sch. Dist.*, 130 F. Supp. 2d 217, 220 (D. Mass. 2001); *Mr. J. v. Board of Educ.*, 98 F. Supp. 2d 226, 242-243 (D. Conn. 2000); *Verginia McC. v. Corrigan-Camden Indep. Sch. Dist.*, 909 F. Supp. 1023, 1033 (E.D. Tex. 1995).

A. The Court should exercise it judicial discretion and grant certiorari in this matter given the pronounced conflict between the circuit courts of appeal on the recovery of expert fees under the IDEA.

As a threshold matter, the issue of whether or not expert fees are recoverable as costs under the attorneys' fees shifting provision of the IDEA is ripe for review by the Court at this time. Supreme Court Rule 10(a) provides that the Court will entertain appeals where a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. Here, the Second Circuit's holding that "Congress intended to and did authorize the reimbursement of expert fees in IDEA actions," *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 402 F.3d 332, 336 (2d Cir. 2005), directly conflicts with the holdings of three other circuits, *see Goldring*, 416 F.3d at 73

(prevailing party under IDEA cannot recover expert fees); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 (7th Cir. 2003) (same); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1031 (8th Cir. 2003) (same). While the parents state that the District's petition for writ of certiorari should be denied because "fewer than half the circuits have yet considered the question [of expert fees under the IDEA]," *see* Res. Br. at 3, this proposed test is not recognized by statue, court rule or case law.

B. The IDEA contains no explicit statutory authority for the recovery of expert fees.

The IDEA's fee-shifting provision states that "in any action or proceeding brought under this section, the court, in its discretion, may award *reasonable attorney's fees as part of the costs* to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B) (emphasis added). That the crucial statutory language -- "reasonable attorneys' fees as part of the costs," *id.* -- fails to allow a prevailing party to shift his expert fees flows directly from the cannon of statutory construction known as *expressio unius est exclusio alterius*, to expressly include one or more of a class in a written instrument must be taken as an exclusion of all others. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 29 (2001).

C. The Court's decision in Casey does not endorse an elevation of legislative history over the absence of explicit statutory authority for the recovery of expert fees under the IDEA.

The Second Circuit erred in construing dicta in *Casey*, which commented on some of the legislative history behind the IDEA's attorneys' fees provision, *see Casey*, 499 U.S. at

91 n.5,[1] as authority to depart from the text of the statute and conclude that Congress intended to allow prevailing parties to recover the costs of experts, *see Murphy*, 402 F.3d at 337.

In *Casey*, the Court addressed whether an earlier version of 42 U.S.C. § 1988 provided explicit statutory authorization for the recovery of expert fees. *See Casey*, 499 U.S. at 87. The Court concluded that it did not. *See id.* at 97. "Because Section 1415 and the version of section 1988 construed in *Casey* contain materially identical language and *Casey* held that section 1988's language does not enable a prevailing party to shift expert fees, we cannot but conclude that section 1415 does likewise." *Goldring*, 416 F.3d at 74.

The *Casey* Court's footnote reference to an IDEA Conference Report, *see Casey*, 499 U.S. at 91 n.5, does not authorize a departure from the ordinary meaning of the term "costs" in the IDEA, *see Goldring*, 416 F.3d at 75. "If the [*Casey*] Court had found this one sentence of legislative

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1. The Court's footnote states in full:

> WVUH cites a House Conference Committee Report from a statute passed in 1986, stating: "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case." See H.R.Conf.Rep. No. 99-687, p. 5 (1986) (discussing the Handicapped Children's Protection Act of 1986, 20 U.S.C. § 1415(e)(4)(B)). In our view this undercuts rather than supports WVUH's position: The specification would have been quite unnecessary if the ordinary meaning of the term included those elements. The statement is an apparent effort to *depart* from ordinary meaning and to define a term of art.

Casey, 499 U.S. at 91 n.5.

history compelling, it would have included section 1415 in its catalogue of statutes authorizing a prevailing party to shift attorneys' fees as well as expert fees." *See id.* at 75-76.

D. The Second Circuit erred in relying on legislative history to construe the IDEA as providing for the recovery of expert fees.

The Second Circuit's reliance on legislative history to conclude that expert fees are recoverable under the IDEA, *see Murphy*, 402 F.3d 336-37, is misplaced as "a sentence in a conference report cannot rewrite unambiguous statutory text, particularly text with a Supreme Court-tested and -approved meaning," *see Goldring*, 416 F.3d at 75. As Justice Oliver Wendell Holmes once quipped: "Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean." *See* Oliver Wendell Holmes, *Collected Legal Papers* at 207 (1920). Justice Holmes also stated, "We do not inquire what the legislature meant; we ask only what the statute means." *See id.*

Likewise, Congress's inaction with respect to section 1415 following the Court's decision in *Casey* is not probative to the issue of recovery of expert fees under the IDEA. *Compare Goldring*, 416 F.3d at 76 *with Murphy*, 402 F.3d at 337. The Second Circuit erred in reasoning "that Congress, on the basis of the Supreme Court's decision in *Casey*, saw no need to amend the IDEA because the Court had recognized that, in enacting the IDEA, Congress sufficiently indicated in the Conference Committee Report that prevailing parties could recover expert fees under the Act." *See Murphy*, 402 F.3d at 337. The D.C. Circuit's reasoning is more persuasive: "given that the *Casey* Court merely labeled the Conference

Report an 'apparent effort' by the congressional committee and did not number section 1415 among the statutes authorizing the recovery of attorneys' fees *and* expert fees, we are unwilling to infer from Congress' failure after *Casey* to amend section 1415 that the Congress believed the Supreme Court had considered the text of to have been altered by the Conference Report." *See Goldring*, 416 F.3d at 76 (emphasis in original). The Second Circuit's inferential path, that Congress' failure after *Casey* to amend section 1415 reflects Congress' belief that the Supreme Court had considered the IDEA's text to have been altered by the Conference Report, *see Murphy*, 402 F.3d at 337, "leads to where reason goes to die," *see Goldring*, 416 F.3d at 76.

II. The Circuit Court erred permitting, under the IDEA's attorneys' fees shifting provision, 20 U.S.C. § 1415(i)(3)(B), the recovery of a non-testimonial expert assisting parents in an impartial due process hearing without the guidance of a licensed attorney.

Contrary to the parents' assertion, the dearth of evidence presented to the lower courts of Ms. Arons' alleged expertise and expert services rendered to the parents is not a "highly fact-bound" claim. *See* Res. Br. at 3. It is undisputed that Ms. Arons is not licensed to practice law in New York State or any other. *See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, No. 99 Civ. 0204, 2003 WL 21694398, at *4 (S.D.N.Y. July 22, 2003), *aff'd*, 402 F.3d 332 (2d Cir. 2005).

From Ms. Arons' certifications and the record of the impartial hearing below, it is also undisputed that, notwithstanding the absence of a license to practice law, Ms. Arons systematically performed tasks at the hearing which one can only be characterized as the practice of law: she accepted the parents' case, she set a fee, she gave legal advice, she planned legal strategy, she prepared examination